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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN ALLEN

Plaintiff,

v.

HOMEQ SERVICING INC.,
DOES 1 TO 50,
Defendant.

ACTION NO: C-08-03798 MMC

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO REMAND
ACTION TO STATE COURT**

Date: October 10, 2008

Time: 9:00 a.m.

**Location: Courtroom 7, 19th Floor
450 Golden Gate Ave.
San Francisco, CA 94102**

I. INTRODUCTION

Plaintiff John Allen ("Allen") requests that the Court issue an Order remanding this action to the Alameda County Superior Court in Oakland, California. The Court does not have jurisdiction over this matter under the doctrines of Federal Question jurisdiction or Diversity Jurisdiction. Diversity jurisdiction is lacking in this matter because defendant Homeq Servicing Inc. ("Defendant") has not, and cannot show that the amount in controversy exceeds \$75,000.

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II. STATEMENT OF PROCEDURAL HISTORY

On or about February 28, 2008, Allen filed a lawsuit against defendant alleging negligent interference with prospective economic advantage and violation of the Federal Fair Credit Billing Act (15 U.S.C. §1666(a)(B)(ii); 12 C.F.R. §226.13). On or about March 28, 2008, defendant filed a notice of removal to Federal Court based upon Federal Question Jurisdiction. Defendant then filed a motion to dismiss the action. The motion was granted in part, and Allen was granted leave to amend the complaint. Allen filed a second amended complaint on or about July 17, 2008, and dropped his Federal claim for relief. Neither the original complaint nor the subsequent amended complaints included a demand for a specific dollar amount from defendant. On or about July 22, 2008, the Court remanded the action to state court. The Court found that it did not have jurisdiction over this matter because Allen dropped his Federal claim for relief when he filed the second amended complaint. On or about August 8, 2008, defendant filed another notice of removal. Defendant now claims that the Court has diversity jurisdiction over this case.

III. DISCUSSION

A. ALLEN REQUESTS THAT THE COURT REMAND THIS ACTION TO STATE COURT BECAUSE DEFENDANT HAS FAILED TO PROVE THAT THE COURT HAS DIVERSITY JURISDICTION.

The removal statute (28 U.S.C. §1441) is strictly construed against removal jurisdiction. Boggs v. Lewis (9th Cir 1988) 863 F2d 662, 663. “Federal jurisdiction must be rejected if there is *any doubt* as to the right of removal in the first instance.” Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 566 (Emphasis added). The presumption against removal jurisdiction means that the defendant always has the burden of establishing that the removal is proper. Gaus, 863 F2d at 566.

In order for diversity jurisdiction to exist, (1) The plaintiff and defendant must be citizens of different states, and (2) The amount in controversy must exceed \$75,000.

1 28 U.S.C. §1441(b). When a state court complaint does not contain the amount of
2 damages that a plaintiff is seeking, the defendant has the burden of actually proving
3 that the amount in controversy is in excess of \$75,000. The defendant must state facts
4 to support the claim that the amount in controversy exceeds \$75,000. It is not enough
5 to merely state in a conclusory manner that the amount in controversy meets the
6 jurisdictional limit. Gaus, 980 F2d at 566, 567. The ninth circuit has held that a
7 defendant must prove the jurisdictional amount by a “Preponderance of the evidence.”
8 Sanchez v. Monumental Life Ins. Co. (9th Cir. 1996) 95 F3d 856, 860. Moreover, a
9 defendant cannot rely on plaintiff’s settlement demands or statements made during
10 settlement negotiations as proof of the amount in controversy. Gwyn v. Wal-Mart
11 Stores, Inc. (M.D. N.C. 1996) 955 F. Supp. 44, 46.

12 Here, defendant has failed to prove that the amount in controversy in this matter
13 exceeds \$75,000. Allen’s amended complaint does not state the amount of damages that
14 he is seeking from defendant. Defendant contends that the Court has diversity
15 jurisdiction because Allen stated in his initial disclosures that he is claiming \$218,000
16 in damages. Defendant cannot rely on this statement to prove the amount in controversy.
17 The amount that Allen claimed as damages in his initial disclosures was also the amount
18 the he demanded during settlement negotiations. It is clear from case law that an amount
19 demanded by a plaintiff during settlement negotiations cannot be relied upon as
20 evidence of the amount in controversy. Furthermore, defendant, in response to
21 Allen’s settlement demand, claimed that any special damages, such as loss of rental
22 income, must be offset by any mortgage payments that Allen would have made on the
23 home that he attempted to purchase. As such, defendant cannot now claim that the
24 amount in controversy in this matter exceeds \$75,000. The amount of punitive damages
25 and attorney fees that Allen is seeking are unknown at this time. Defendant has failed to
26 provide any facts to meet its burden of proving the jurisdictional amount. Therefore,
27 the Court should remand this matter to the Alameda County Superior Court.

1 **IV. CONCLUSION**

2 Based on the foregoing, Allen requests that the Court grant his motion and
3 remand this case to the Alameda County Superior Court in Oakland, California.

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5 Dated: August 27, 2008

RIDGELL & LAWLOR LLP

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8 By: _____
9 Shawn Ridgell
Attorneys for Plaintiff
JOHN ALLEN